Supreme Court, U.S.
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In The Supreme Court of the United States

JUDITH DIAZ SANTOS,
Petitioner,

v.

DEPARTMENT OF EDUCATION OF THE COMMONWEALTH OF PUERTO RICO; VICTOR FAJARDO, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the First Circuit properly held that the district court did not abuse its discretion by dismissing the case for want of prosecution.

II. Whether the First Circuit properly held that the district court did not abuse its discretion by partially granting Defendant's Motion to Dismiss, specifically Petitioner-Plaintiff's Title I claim under the American's with Disabilities Act (hereinafter A.D.A.) and in the alternative if said claim was revived.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit was entered on August 13, 2004 and is reported at 108 Fed. Appx. 638 (1st Cir. 2004). The order denying the timely petition for rehearing and for rehearing en banc was entered on September 9, 2004 and is not reported. The judgment and order of the district court for the District of Puerto Rico were entered on September 29, 2003 and is not reported.

JURISDICTION

Subject matter jurisdiction for the United States District Court for the District of Puerto Rico was invoked through 42 USC § 2000e et seq., 42 U.S.C. § 12111 et seq., 42 U.S.C. § 12203, 42 U.S.C. § 2000(e)-3, and 29 U.S.C. § 623(d), as well as the First, Fifth, and Fourteenth Amendments of the United States Constitution pursuant to 42 U.S.C § 1983. Jurisdiction of the District Court was also invoked pursuant to 28 U.S.C. § 1331(a) and § 1343 and 28 U.S.C. § 2000e. Subject matter jurisdiction for the Court of Appeals for the First Circuit was invoked through 28 U.S.C. § 1291. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. General Background

Petitioner-Plaintiff Judith Diaz-Santos is a female citizen of the United States of America employed by the Defendant, Department of Education of the Commonwealth of Puerto Rico, as a teacher in 1981. Since 1969 she has completed advanced degrees through Vocational Rehabilitation. During the 1991-1992 school year Petitioner-Plaintiff initiated a complaint with the Equal Employment Office, case number 160-93-5140, which concluded with a Negotiated Settlement Agreement to provide reasonable accommodation under the Americans

with Disabilities Act. A judicial review had been taken of the administrative decision taken by the Education System board of Appeals, and said judgment stated that Petitioner-Plaintiff was qualified to as a disabled person who was to receive the benefits of Reasonable Accommodation under the Americans with Disabilities Act. The judgment carries the Civil Case No. KAC 92-1137 (906) and was issued on May 11, 1993, by State Court Judge Angel Hermida. Due to the negotiated agreement, Petitioner-Plaintiff was assigned to the Superintendent's Offices according to the guidelines established by doctors in direct reference to the illness suffered by Petitioner-Plaintiff. Said illness is a mental impairment that does not allow her to work in direct contact with children and was diagnosed by one Dr. Juan G. Soto as a personality disorder; and a hypomanic disorder that could involve a personality disorder; and a hypo manic disorder which creates a severe occupational and social hindrance. However, one Dr. Baez diagnosed her as having a generalized anxiety disorder. During the 1998-1999 school year Defendant transferred Petitioner-Plaintiff to a school to deal with children with no appraisal of the continuance of her disability and in direct contravention to the aforementioned agreement. The discrimination against Petitioner-Plaintiff from 1998 to the present includes the following behavior on the part of the Petitioner-Plaintiff: discriminatory practices on the basis of her disability, sex, and freedom of speech, including but not limited to engaging in a pattern and practice e of harassment and humiliation of Petitioner-Plaintiff, refusing to promote her or to consider her for positions for which she is qualified, and at other times eliminating her from the register of qualified individuals due to her disability. Defendants have subjected her to a discriminatory and offensive environment in the workplace, and have made offensive slurs to/about her and denied her work privileges, assignment to unhealthy and hazardous working areas and unfair and adverse recommendations.

B. Procedural Background

The complaint, filed on August 26, 1999 and amended on February 25, 2000, was based on employment discrimination due to disability by the recipient of reasonable accommodation in violation of Title I of the American with Disabilities Act of 1990 and Title V section 503 of the same Act, as well as violation of Title VII of the Civil Rights Act of 1964, as amended. The Defendants named in the complaint were the Department of Education of the Commonwealth of Puerto Rico, and Victor Fajardo in both his individual and official capacities. On July 6, 2000, Defendants filed a motion to dismiss with attachments, which Plaintiffs opposed on September 20, 2000. On October 31, 2000, the district court partially granted and partially denied the motion to dismiss. On December 5, 2000, Defendants answered the complaint. On April 4, 2002, Defendants filed for a notice of appeal regarding the order, which partially granted and partially denied their motion to dismiss, and filed a motion to stay proceedings pending appeal on April 10, 2002, that was granted on April 11, 2002. Plaintiffs filed a motion to continue with proceedings on October 22, 2002, and on November 6, 2002, Defendants voluntarily dismissed their appeal, as the Appeals Court lacked jurisdiction.

The district court ordered several settlement conferences between the dates of February 7, 2003, to April 18, 2003, and issued minutes regarding said conferences. On December 30, 2002, the district court originally issued an order setting a jury trial for March 17, 2003, yet after several attempts to settle, and motions regarding the trial date, it was ultimately set for April 2, 2003, before Judge Fuste or a visiting Judge. By March 24, 2003, Defendants filed their *voir dire* questions and proposed jury instructions. From May 1, 2003 to June 6, 2003, several motions were filed by Petitioner-Plaintiff and her legal representation requesting that withdrawal be granted for

Petitioner-Plaintiff's attorneys. On June 30, 2003, the court issued endorsed orders regarding the motions filed by Petitioner-Plaintiff and ultimately granted the motions requesting withdrawal and granting until July 23, 2003 to obtain new legal representation. On July 23, 2003, the new attorneys filed a Special Notice of Attorney Appearance on behalf of Petitioner-Plaintiff and in the same motion requested an extension of time of 45 days to allow for delivery and evaluation of missing documents. On September 29, 2003, the district court issued an order dismissing the case for lack of diligent prosecution and followed it up with a judgment issued on the same day. A docket entry on the same date closes the case. On October 1, 2003, Petitioner-Plaintiff filed for reconsideration and on December 18, 2003, the district court issued an order denying reconsideration of the judgment and order.

REASONS FOR GRANTING THE WRIT

The district court abused its discretion in dismissing the case on September 26, 2003, as the presiding judge had prior knowledge that Petitioner-Plaintiff's attorneys had requested to be withdrawn as Petitioner-Plaintiff's legal representation, and that Petitioner-Plaintiff had requested the present law firm to continue with her representation, thus complying with the District Court's order to either resolve her case by settlement or to secure legal representation. Despite this knowledge the district court imposed upon Petitioner-Plaintiff the sanction of dismissal, which was grossly disproportional to the gravity of Petitioner-Plaintiff's actions, as Petitioner-Plaintiff's actions consisted in searching for new legal representation and trying to responsibly evaluate the case for further proceedings. The district court once again abused its discretion by denying Petitioner-Plaintiff's motion for reconsideration of the order dismissing her case, as it was both timely filed and clearly noted the fact that Petitioner-Plaintiff had complied with the court order and that

situations out of her control had delayed her attorney's further appearance. In said motion the Court was notified that the documents, which were requested from Petitioner-Plaintiff's former attorneys were finally given to her on September 30, 2003, while the order to dismiss the case was issued before that date, on September 26, 2003.

The district court abused its discretion by granting Defendant's Motion to Dismiss based on Defendant's allegations that Petitioner-Plaintiff had failed to state a prima-facie case under Title I of the ADA for alleged failure to state a record of impairment as well as "in the alternative" alleged failure to allege facts which support the conclusion that Defendants treated and regarded her as having a mental impairment. In the alternative, even if the First Circuit finds that the district court did not err in granting the partial dismissal, Defendant's pled and also alleged in their Answer to the Complaint, filed after the dismissal, that they entered into a settlement agreement with Petitioner-Plaintiff conceding her reasonable accommodation under the A.D.A., which equates to a revival of Petitioner-Plaintiff's allegations, as well as an admission to the fact that Defendants considered Petitioner-Plaintiff to be "disabled" within the meaning of the A.D.A. Furthermore, Petitioner-Plaintiff re-alleged her Title I claim in the pretrial conference order and Defendants did not oppose it, and the district court approved it, so a constructive amendment occurred and the Title I claim informally amended the complaint.

The imposition as well as the severity of sanctions is reviewed under the abuse of discretion standard. The First Circuit has stated that it "review[s] the district court's dismissal of a case as a sanction for abuse of discretion." *Bachier-Ortiz v. Colon-Mendoza, et al.*, 331 F.3d 193, 194-195 (1st Cir. 2003). Furthermore, "[...] the court of appeals must look at the totality of the circumstances." Id. It is settled that "[a]ppellate review of a dismissal under

Fed.R.Civ.P. 12(b)(6) is plenary" *Roth v. United States of America*, 952 F.2d 611, 613 (1st Cir. 1991).

I. WHETHER THE FIRST CIRCUIT PROPERLY HELD THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DISMISSING THE CASE FOR WANT OF PROSECUTION.

The district court had knowledge that Petitioner-Plaintiff had been diligent in contracting legal representation and thus had complied, or was in the process of complying, with the order when her case was dismissed for want of prosecution Under Rule 41 (b) of the Federal Rules of Civil Procedure.

"The authority of a federal trial court to dismiss a Petitioner-Plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted." *Link v. Wabash R.R.*, 370 U.S. 626, 629 (1962). However, "the sanction of dismissal with prejudice for want of prosecution is a unique and awesome one, foreclosing forever the Petitioner-Plaintiff's opportunity to obtain judicial redress" [*Pomales v. Celulares Telefonica, Inc.*, 342 F.3d 44, 48 (1st Cir. 2003)] and, thus, "fairness requires that some limits be placed on its use". *Velazquez-Rivera v. Sea-Land Serv., Inc.*, 920 F.2d 1072, 1075-76 (1st Cir. 1990). In the case of *Pomales*, supra., the Petitioner-Plaintiff, after diligently prosecuting her claims for over a year, discharged her attorney and caused a four month delay while looking for new legal representation. The First Circuit has stated that "the propriety of dismissal turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct." *Pomales*, supra at 50 (*quoting in part Link supra at 632*). Furthermore, in the above mentioned case the First Circuit considered three aspects to decide whether a dismissal with prejudice was or was not appropriate for said case: (1) Diligent prosecution on the part of the Petitioner-Plaintiff until the withdrawal of legal representation; (2) Fair warning by the court of its inclination to employ so

severe a sanction; and (3) whether the delay caused constituted misconduct sufficiently extreme to justify dismissal with prejudice.

The First Circuit has also noted that a district court can abuse its discretion "by neglecting to consider a significant factor that appropriately bears on the discretionary decision". See *Henry v. INS*, 74 F.3d 1, 4 (1st Cir. 1996), and that, when "non-compliance occurs, both the nisis prius court and the court of appeals must look at the totality of the circumstances", *Bachier-Ortiz v. Colon–Mendoza*, 331 F.3d 193, 195 (1st Cir 2003). To ensure against arbitrariness, a reviewing court must balance the trial court's authority to impose such a sanction against the obvious policy considerations that favor disposition of cases on the merits. *Chamorro v. Puerto Rican Cars, Inc.* , 304 F.3d 1, 4 (1st Cir. 2002) (citing *Zavala Santiago v. Gonzalez Rivera*, 553 F.2d 710, 712 (1st Cir. 1977)).

It is clear from the facts of the case recorded in the docket, that Petitioner-Plaintiff was diligent in the prosecution of her case at all times. The district court, in its order of September 29, 2003 stated that for months Petitioner-Plaintiff had been "unable or unwilling to resolve this case by settlement and/or secure legal representation as previously ordered", yet a "Special Appearance to Request an Extension of Time to Retain Counsel" for Petitioner-Plaintiff was entered into the docket on July 23, 2003, in said motion the new attorneys notified the court that Petitioner-Plaintiff's former counsel had been requested to provide documents that were vital to both the proper assessment of the cause of action and the responsible representation of Petitioner-Plaintiff. From the face of this motion, it is clear that Petitioner-Plaintiff was in the process of contracting the services of an attorney. Furthermore, the only other option Petitioner-Plaintiff had, according to the order, was to settle the suit, which would not be viable to attempt without legal representation,

especially when the Defendant was represented by a seemingly seasoned counsel, whose main obligation was to represent a client whose interests clearly opposed those of Petitioner-Plaintiff's. It cannot be said that Petitioner-Plaintiff was still being represented by her previous counsels, as it is clear from the record that the relationship had turned adverse and lacked trust. It is clear that in the present case, Petitioner-Plaintiff **did** diligently prosecute her claims until her attorneys withdrew.

In the order of September 29, 2003, the district court cited various docket document numbers to justify the dismissal, these numbers are the following 56, 58, 61-73, 81, 83, 86-87, and 91. Docket document numbers 61 through 68 as well as 70, 74, 81, and 83 are motions and orders which all pertain to gestures taken, or to be taken, regarding the possible settlement of the case. Docket document numbers 58, 69, 72, and 73 concern the trial dates set in the case. Delays in the case are documented by Docket document numbers 56, 73, and 63. Docket number 58 is a court order denying the joint request for the pretrial conference to be changed to a status conference, this order states that **BOTH** parties were unprepared for the pretrial conference; docket number 73 is an order denying the joint motion to transfer the trial date; and docket number 63 is a response motion by Petitioner-Plaintiff which among other things, makes reference to other delays that stalled the case. Docket numbers 74, 86, 87, and 88, and 89 pertain to the withdrawal of Petitioner-Plaintiff's Counsels in the case. Thirty days were requested in docket number 86 by Petitioner-Plaintiff's counsel for Petitioner-Plaintiff to secure new legal representation.

The aforementioned docket documents do not show a failure to prosecute on the part of the Petitioner-Plaintiff, in three of the above eighteen (18) instances which were used to justify the dismissal, delays were indeed caused; however, two of the three delays caused were the fault of

the counsels of **all** parties not only Petitioner-Plaintiff. It would be extreme and unjust to attribute all delays to Petitioner-Plaintiff, as Defendants were active parties in causing the delays and benefit from the dismissal of the complaint. Petitioner-Plaintiff, up until her counsels were released from representing her, had been extremely diligent in the case, to the point where she wrote two (2) motions to the court *pro se* when she felt that her interests and rights were not being properly protected by her then-counsel proving her diligent prosecution of claims. Furthermore, there is no indication that Petitioner-Plaintiff requested the resignation of her attorney for the purpose of stalling or deliberately delaying the case, as the new attorneys appeared within term, whether the district court acknowledged the appearance or not.

Regarding whether or not fair warning was given to the Petitioner-Plaintiff, the First Circuit has stated that "litigants have an unflagging duty to comply with clearly communicated case-management orders, and this duty extends even to litigants who proceed pro se". *Rosario-Diaz v. Gonzalez*, 140 F.3d 312, 315 (1st Cir. 1998). However, it was further stated in *Rosario-Diaz* that if the appellants had kept the court abreast of any difficulties that they were encountering with regard to legal representation, that modicum of attention might have permitted the district court to consider whether good cause existed to modify its scheduling order. *Also see, Fed.R.Civ.P. 16 (b)*.

In the present case, Petitioner-Plaintiff had filed pro-se motions requesting the Court's aid, so the court did have knowledge of her predicament. Regarding the time Petitioner-Plaintiff took in looking for new legal representation, the case of *Pomales,* supra. at 49, would be applicable, due to the fact that "as a layperson she may not have appreciated the risk inherent in delay". However, it can be seen from Docket number 91 that Petitioner-Plaintiff did manage to comply with the lower court's order, as the

new attorneys did timely make an appearance on behalf of Petitioner-Plaintiff and notified the court of the problems existing in the case, to wit, of the incomplete files and the request for vital missing documents or a meeting between attorneys; additionally, the new attorneys notified the district court of the fact that Petitioner-Plaintiff was acting in a diligent manner yet circumstances beyond Petitioner-Plaintiff's control were hindering her full compliance.

Furthermore, the Court was made aware that, in order to responsibly represent Petitioner-Plaintiff, a proper evaluation of the judicial file was needed, and because Petitioner-Plaintiff's judicial file was missing vital documents, it was necessary to request that Petitioner-Plaintiff supplement and complete the file. It is clear that both Petitioner-Plaintiff and the new attorneys did all that could be done to secure copies of Petitioner-Plaintiff's file that were in the hands of another attorney, leaving Petitioner-Plaintiff without control of the situation, a fact that the district court had knowledge of. Thus, the aforementioned dismissal order which states that Petitioner-Plaintiff was unable or unwilling to "secure legal representation", is incorrect because, through the appearance of the new attorneys, it is clear that Petitioner-Plaintiff was both willing and able to secure legal representation.

The First Circuit has imposed limitations on the discretion of the presiding lower court judges regarding the imposition of dismissal as a penalty for delay to a) Petitioner-Plaintiff's misconduct is extreme or b) the district court has determined that none of the lesser sanctions available to it would truly be appropriate. See *Enlace Mercantil International, Inc. v Senior Industries, Inc.*, 848 F.2d 315, 317 (1st Cir. 1988). The First Circuit has stated that "dismissal should not be viewed either as a sanction of first resort or as an automatic penalty for every failure to abide by a court order". *Bachier-Ortiz*, supra at 194-195

(quoting *Young v. Gordon*, 330 F.3d 76, 81 (1st Cir 2003)). "Dismissal for lack of prosecution is appropriate only when Petitioner-Plaintiff's misconduct is serious, repeated, contumacious, extreme, or otherwise inexcusable." *Id* (citing *Young id.)* The First Circuit has decided that when an isolated incident appears to have been the sole basis for the dismissal, the order for dismissal is sometimes vacated if the case has not been marred by any persistent disregard of court orders, deliberate stalling, or repeated nonchalance. *Bachier Ortiz*, supra at 195. Another factor considered by the First Circuit is whether or not the opposing parties have been prejudiced.

Any delay caused did not constitute misconduct sufficiently extreme to justify dismissal with prejudice, and her conduct was not so extreme to warrant a dismissal. All Petitioner-Plaintiff did was attempt to comply with the court's order. Both Petitioner-Plaintiff and her current representation operated under the presumption that good faith and diligence on the part of the Defendants and Petitioner-Plaintiff's prior counsel would prevail. However, the documents required to properly defend Petitioner-Plaintiff's rights were not returned and/or given to Petitioner-Plaintiff until after the case was dismissed by the district court and this just after the intervention of the Puerto Rico's attorney general after Petitioner-Plaintiff filed a complaint in that office. Furthermore, the record clearly shows, that although delays were caused, the majority of them were not attributable to Petitioner-Plaintiff.

Furthermore, Petitioner-Plaintiff informed the district court of her plight, which as it can be seen from the docket was ignored by said court. It is important to note that Petitioner-Plaintiff wasn't expecting the court to wait indeterminately for her to find new legal representation, she had done all she could do, aside from entering into settlement discussions pro se, to comply with the court order.

Finally, Defendants cannot claim that they have been prejudiced by any delay occurring in the case, not only because they contributed to said delays but also because the case is so ripe for trial that *voir dire* and jury instructions had already been filed. In accordance with the standards set by the First Circuit for dismissal as a sanction, the district court abused its discretion in dismissing Petitioner-Plaintiff-appellant's cause of action with prejudice where she timely secured legal representation, was diligent in keeping the district court abreast of litigation difficulties, and any undue delay was caused by defendants-Apellees and was not prejudicial. For these reasons, the district court's order dismissing Petitioner-Plaintiff-Appellant's complaint with prejudice must be vacated.

The First Circuit has previously taken into consideration the reasons given for delay in a timely filed motion for reconsideration, when a case is dismissed for lack of prosecution. See *Bachier*, supra at 194. Regarding said case, the First Circuit stated that it generally reserves "the sanction of dismissal for lack of prosecution to situations where Petitioner-Plaintiff's misconduct is "serious, repeated, contumacious, extreme or otherwise inexcusable" See *Vega–Encarnación v.Babilonia*, 344 F.3d 37, 40-41 (1st Cir. 2003). Moreover, "[...] tardiness does not automatically result in dismissal". See *NEPSK, Inc. v. Town of Houlton*, 283 F.3d 1, 7 (1st Cir. 2002). In the present case, a timely motion for reconsideration was filed and it pointed out that the delay was not attributable to Petitioner-Plaintiff and that the documents necessary for proper evaluation of the case were never timely submitted to Petitioner-Plaintiff [**Dckt. No. 95**].

A factor considered in the case of *Bachier*, supra, was the opposition's participation in delays. As pointed out in the motion for reconsideration, an incredible one (1) year and nearly four (4) months was taken by Defendants to answer the complaint, then Defendants filed an appeal with

the First Circuit when the lower court denied their motion to dismiss, and requested a stay of the proceedings until the resolution of their appeal. Petitioner-Plaintiff opposed said stay, yet the proceedings were stayed by the district court and lasted for a period of eight (8) months. It should be noted that the First Circuit ordered Defendants' to voluntarily dismiss their appeal. Moreover, the many settlement conferences ordered in the case also took up considerable time. It should be noted that when Petitioner-Plaintiff's former counsels requested from the district court that they be relieved from representing Petitioner-Plaintiff, the district court filed an order on June 30, 2003, granting a period of twenty-three (23) days for Petitioner-Plaintiff to retain counsel and for said counsel to make an appearance before the court. Within term, the new attorneys did make an appearance and requested a forty-five (45) day extension for the delivery and evaluation of the missing documents. However, the district court effectively ignored the request for extension of time and implicitly denied it as an order was issued dismissing the complaint for lack of diligent prosecution on September 29, 2003. In short, Defendants were rewarded for their pattern of delay as they played an extremely active role in stalling the case and then the complaint against them was dismissed for want of prosecution.

The most important factor to consider is that Petitioner-Plaintiff notified the court through her reconsideration motion that she did not receive the missing documents that were relevant for proper and ethical evaluation of the case, until after the case was dismissed, and even provided the court proof of the fact. However, the district court abused its discretion and once again chose to ignore these facts and denied the aforementioned reconsideration request.

II. WHETHER THE FIRST CIRCUIT PROPERLY HELD THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY PARTIALLY GRANTING DEFENDANT'S MOTION TO DISMISS, SPECIFICALLY PETITIONER-PLAINTIFF'S TITLE I CLAIM UNDER THE AMERICAN'S WITH DISABILITIES ACT (HEREINAFTER A.D.A.) AND IN THE ALTERNATIVE IF SAID CLAIM WAS REVIVED.

Petitioner-Plaintiff's claim under Title I of the A.D.A. was dismissed based on her alleged failure to allege sufficient facts to establish a prima-facie case of disability pursuant to 42 U.S.C. § 12102(2). Specifically the district court justified the dismissal under F.R.Civ.P 12 (b)(6) by stating that Petitioner-Plaintiff neither established a record of impairment nor did she allege facts in her complaint which supported the conclusion that Defendants treated her as substantially limited by a mental impairment, and thus her claims that her subjection to a hostile environment and Defendant's refusal to promote her based on her mental impairment were dismissed for failure to state a prima-facie case under Title I.

A. Requisites for Pleadings

Rule 8 of the Federal Rules of Civil Procedure outlines the requisites of Pleadings filed in a Federal District Court. Rule 8 states "[a] pleading which sets forth a claim for relief,...shall contain...a short and plain statement of the claim showing that the pleader is entitled to relief..." F.R.Civ.P. 8(a)(2). A Petitioner-Plaintiff is required to set forth factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory *Romero-Barceló v. Hernandez-Agosto*, 75 F.3d 23, 28 n.2 (1st Cir. 1996) (Internal citations omitted.). Regarding a civil rights complaint, the contained allegations must "outline facts sufficient to convey specific instances of unlawful discrimination." *Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 16 (1st Cir. 1989).

B. Requisites for Stating a Claim under Title I of the A.D.A.

When the cause of action is employment discrimination, the First Circuit has stated that,

[t]o state a claim for employment discrimination under Title I of the ADA, a Petitioner-Plaintiff typically must show: (1) that he or she suffers from a disability within the meaning of the Act; (2) that he or she was able to perform the essential functions of the job, either with or without reasonable accommodation; and (3) that the employer discharged him or her in whole or in part because of that disability. *Feliciano v. State of Rhode Island*, 160 F.3d 780, 784 (1st Cir. 1998); also see 42 U.S.C. § 12112(a).

Concerning the requisite of alleging disability, according to the ADA as cited by the First Circuit in the case of *Katz v. City Metal, et al,* 87 F.3d 26, 30 (1st Cir. 1996), the term "disability" means, with respect to an individual—

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

"Under the regulations an individual who has an impairment that is not substantially limiting (or has no impairment at all) is nevertheless 'disabled' if he or she is treated by the employer as having an impairment that does substantially limit major life activities." *Katz,* supra at 32 (*quoting in part 29 C.F.R. 1630.2 (1)(1)*). According to the *Katz* doctrine a prima facie case can be proved if it is established that the employer regarded the Petitioner-Plaintiff as having an impairment constituting a disability under section 12102(2)(c) of the Act.

The Supreme Court has stated that a person is regarded as disabled within the meaning of the ADA if:

> (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that the person's actual, nonlimiting impairment substantially limits one or more major life activities. *Sutton v. United Airlines Inc.* 119 S.Ct. 2139, 2149-50 (1999).

Both the Supreme Court and the EEOC have discussed the requirements to establish a disability under subsection (c) when the Petitioner-Plaintiff claims the life activity regarded as impaired is the activity of working. "[w]hen the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that plaintiffs allege that they are unable to work in a broad class of jobs." *Sutton* supra at 2151. Furthermore, the Supreme Court stated, "If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs." Similarly, "if a host of different types of jobs are available, one is not precluded from a broad range of jobs". Id. The decision in *Sutton* is consistent with 29 C.F.R. § 1630.2 (J) (3), which states:

> With respect to the major life activity of working—(I) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

C. Standard to dismiss under FRCP 12 (b)(6)

Under 12 (b)(6), [a] claim may be dismissed either because it asserts a legal theory that is not cognizable as a matter of law or because it fails to allege sufficient facts to support a cognizable legal claim. See *SmileCare Dental Group v. Delta Dental Plan of Cal, Inc.*, 88 F.3d 780, 783 (9th Cir. 1996). When a claim is challenged under this Rule, the court presumes that all well-pleaded allegations are true, resolves all doubts and inferences in the pleader's favor, and views the pleading in the light most favorable to the non-moving party. See *Albright v. Oliver* 510 U.S. 266, 267 (1994).

> A court must accept as true the complaint's well-pled factual averments, excluding however, "bald assertions periphrastic circumlocutions, unsubstantiated conclusions, or outright vituperation." Id. (Citing *Correa-Martinez v. Arrillaga-Belendez,* 903 F.2d 49, 52 (1st Cir. 1990)).

Also, "[a]t the same time, the court must draw all inferences reasonably extractable from the pleaded facts in the manner most congenial to the Petitioner-Plaintiff's theory. *Miranda*, supra at 43; also see *Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 16 (1st Cir. 1989). Moreover, "[i]n the last analysis, a Petitioner-Plaintiff is obligated to set forth in her complaint 'factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory. " *Roth*, supra at 613 (*quoting in part Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 515 (1st Cir. 1988)).

Finally, the United States Supreme Court has stated that "a complaint should not be dismissed for failure to

state a claim unless it appears beyond doubt that the Petitioner-Plaintiff can prove no set of facts in support of his claim which would entitle him to relief", See *Conley v. Gibson*, 335 U.S. 41, 45-46 (1957). That policy has been followed by this Circuit, which has stated "[f]or purposes of *Fed.R.Civ.P.* 12(b)(6), the possibility of a claim is enough to defeat dismissal". 37 F.3d 12, 17 (1st Cir. 1994). In fact, the First Circuit has stated that if a compliant "contains enough detail to allow defendants to answer Rule 12 (b)(6) requires no more". *Ponometrics Inc. v. Hospitality Franchise Sys., Inc.*, 203 F.3d 790, 794 (Fed. Cir. 2000).

> Because the complaint alleges sufficient facts to make out a viable theory for Petitioner-Plaintiff-appellant to recover on her claim, the district court's order dismissing Petitioner-Plaintiff-appellant's claim under Title I should be reversed. The First Circuit has stated that it may affirm a dismissal for failure to state a claim "only if it is clearly appears, according to the facts alleged, that the Petitioner-Plaintiff cannot recover on any viable theory." *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990)).

D. Petitioner-Plaintiff's Complaint Complied with the Pleading Standard for Title I of A.D.A. and therefore Should Not have been Dismissed.

The judge dismissed, without prejudice, Petitioner-Plaintiff's claims under Title I of the ADA, claiming that she "omits from her amended complaint a minimally sufficient factual predicate regarding disability." More specifically the district court, in the aforementioned opinion and order, justified its decision by arguing that Petitioner-Plaintiff did not explicitly assert that her mental impairment substantially limits any major life activity. In

Romero-Barceló, supra, the First Circuit stated that inferential allegations were acceptable if they covered required elements to sustain a cause of action. In the present case Petitioner-Plaintiff does indeed set forth allegations that contain the elements required to sustain an A.D.A. claim. Number ten (10) under the "First Cause of Action" contained in the amended complaint sets forth that Petitioner-Plaintiff filed a complaint under the A.D.A. with the Equal Employment Opportunity Commission due to discriminatory practices on the part of the Department of Education, and that both parties resolved the issue through a Negotiated Settlement Agreement. Number eleven (11) sets forth that the Department of Education agreed to reasonably accommodate Petitioner-Plaintiff according to the American with Disabilities Act's meaning of Reasonable Accommodation. Furthermore, number twelve (12) states that Petitioner-Plaintiff was assigned to the Superintendent's Office according to the guidelines established by doctors in direct reference to her illness.

From these allegations, it can be clearly inferred that Petitioner-Plaintiff was disabled or considered to be disabled by the Department of Education, and enjoyed reasonable accommodation according to the guidelines of the Americans with Disabilities Act granted to her by the Department of Education. It can clearly be inferred from the face of the amended complaint that Petitioner-Plaintiff had enough of a record of her illness to gain reasonable accommodation from her employer or that her employer considered her to be sufficiently disabled to concede to her reasonable accommodation under the A.D.A. From number 34 of the complaint it is clear that the major life activity that was substantially limited was her work. In fact, her employer would not have granted reasonable accommodation to her, unless her impairment substantially limited the major life activity of work. Another inference can be taken from number 31 of the amended complaint, that Petitioner-Plaintiff's disability caused her the need for

reasonable accommodation. The fact that these allegations are not direct but rather inferential allegations makes no difference, as they are sufficient to sustain a cause of action.

The district court further justified granting the motion for dismissal by arguing that Petitioner-Plaintiff had not clarified whether her impairment disabled her from performing a single, particular job or a class of jobs. Once again, from the face of the amended complaint the allegations, although not direct, do clarify that Petitioner-Plaintiff's impairment substantially affects her ability to perform a class of jobs. As stated before, according to the Department of Education's actions, said entity believed and treated Petitioner-Plaintiff as a disabled person and discriminated against her based on that belief, and refused to give Petitioner-Plaintiff promotions, from which can be inferred that the Department felt that she was incapable of performing a class of jobs. Furthermore, the Department gave her reasonable accommodation when it assigned her to the Superintendent's office conforming the guidelines established by doctors in reference to her illness, it can be inferred that she was assigned to a different class of job than that which she had been performing, and then removed her from that office in order to place her in a School, it can, once again, be reasonably inferred that the positions were different. Furthermore, in number fourteen (14) of the complaint Petitioner-Plaintiff alleges that due to her disability she was not considered for positions for which she qualified, and that she was able to perform the essential functions of her position and other positions within the Department.

These allegations point out that all the requisites of a complaint are fulfilled, even more so when Petitioner-Plaintiff's Motion in Response to Defendant's Motion to Dismiss is considered, as the allegations made in the complaint are clarified, and makes the point that Petitioner-Plaintiff was already declared to be disabled and

protected by the American with Disabilities Act by a State Court as well as by the employer as having a disability according to the ADA statutory provisions. Said disability substantially affects her ability to perform jobs that put her in direct contact with children, which is a whole class of jobs —diverse teaching positions, teacher's assistant, librarian, school secretary, even janitorial work. From the aforementioned arguments it can be seen that the first two prongs of *Feliciano v. State of Rhode Island* analysis, with or without consideration of the local court judgment had been satisfied.

In the alternative, Petitioner-Plaintiff's ADA claim should be admitted because, through their answers to the allegations of the amended complaint, Defendants revived Petitioner-Plaintiff's allegations of her Title I–Claim. Specifically, Defendants admitted that Petitioner-Plaintiff was disabled and received reasonable accommodation due to her disability. This admission, thus waives their arguments in their motion to dismiss that the allegations were insufficient. Defendants further waived this argument when they failed to object to Petitioner-Plaintiff's theory and uncontested facts set forth in the approved Proposed Pre-trial Order which they signed.

Rule 15(b) of the Federal Rules of Civil Procedure, in its applicable part, sets forth:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment;

Furthermore, said Rule in its sub-section (c) (2) states that

> An amendment of a pleading relates back to the date of the original pleading when the claim or defense asserted in the amended pleading arouse out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.

To be constructively amended, a pleading could be mentioned in pretrial filings or explicit reference during the trial. See *Rodriguez Bruno v. Doral Mortgage Corp.*, 57 F.3d 1168, 1171 (1st Cir. 1995).

> For purposes of Rule 15 (b), implied consent to the litigation of an unpleaded claim may arise from one of two generic sets of circumstances. First, the claim may actually be introduced outside the complaint – say, by means of a sufficiently pointed interrogatory answer or in a pretrial memorandum—and then treated by the opposing party as having been pleaded, either through his effective engagement of the claim or through his silent acquiescence.

Rodriguez Supra at 1172. "As a general principle the presentation of claims beyond the complaint without objection is considered an informal amendment of the complaint". *Action Mfg., Inc. v. Fairhaven Textile Corp.*, 790 F.2d 164 , 167 (1st Cir. 1983).

Courts, however, will not find implied consent if the nonmoving party would be prejudiced by the injection of the new issue. *Cioffe v. Morris*, 676 F.2d 539, 541-542 (11th Cir. 1982). "It is not enough that an issue may be 'inferentially suggested by incidental evidence in the record'; the record must indicate that the parties understood that the evidence was aimed at an unpleaded issue." *Rodriguez*, supra 1172

(*quoting in part Cole v. Layrite Prods. Co.*, 439 F.2d 958, 961 (9th Cir. 1971))

In the present case Defendants admit to the fact that they signed a Negotiated Settlement Agreement in reference to charges filed with the Equal Employment Opportunity Commission (EEOC) under the "Americans with Disabilities Act", in paragraph 10 of their answer to the amended complaint where they admit to the third statement of averment 10 of the amended complaint, which in turn states "As a result of this action the Petitioner-Plaintiff and Defendant, Department of Education entered into a Negotiated Settlement Agreement in reference to charges filed with the Equal Employment Opportunity (EEOC) under the "Americans With Disabilities Act." Furthermore, Defendants admit to averment eleven of the amended complaint, which states "In that occasion, Mrs. Diaz Santos agreed to not to [sic] institute a lawsuit against the Department of Education in exchange for a reasonable accommodation according to the regulations of the American With Disabilities Act. The Department of Education agreed to give Mrs. Diaz Santos the same opportunities for promotions, as it gave to all employees of the Department." By admitting to these two averments the Department of Education accepted that it gave Petitioner-Plaintiff reasonable accommodation, and said reasonable accommodation was under the A.D.A regulations; therefore, Petitioner-Plaintiff complied with all requisites of stating a prima facie case of disability discrimination as a disabled person who enjoyed the benefits of reasonable accommodation under the A.D.A. Furthermore, in the Proposed Pretrial Order Petitioner-Plaintiff once again alleged that she was disabled and received reasonable accommodation from a covered entity, and was discriminatorily denied job opportunities and promotions due to her disability. The pretrial order notes that Petitioner-Plaintiff was found to be entitled to reasonable accommodation due to her disability by a competent court of law. If Petitioner-Plaintiff's employer gave her reasonable accommodation under the A.D.A. it was because she was already disabled, or considered to be disabled by the

Department of Education. Thus, all elements required for an effective claim of employment discrimination due to disability were not even contested after the admissions set forth by the Department of Education in their Answer to the Amended Complaint. Therefore, the court order of dismissing the Title I ADA claim should be considered moot or in the alternative should be overturned, as Defendant's not only revived Petitioner-Plaintiff's allegations, but also admitted them in their Answer to the Complaint.

Another ground to review this dismissal is found in the Court's failure to consider the exhibit on the Petitioner-Plaintiff's Opposition to the Motion to Dismiss, which was the local court's judgment declaring that Petitioner-Plaintiff was indeed disabled under the A.D.A. and that Defendants had previously failed to give her the reasonable accommodation which she deserved, even though the district court accepted, and was willing to consider another judgment attached as exhibit to said motion. In fact, the Court opted to defer judgment on Defendant's allegation of res judicata until it received the pertinent translation of said judgment. From the court's unwillingness to consider one judgment and willingness to consider another, it can be clearly seen that the district court failed to adjudicate in a fair manner the claim under Title I of A.D.A.

CONCLUSION

For the foregoing reasons, Petitioner-Plaintiff submits that this Court should grant review in this case to reverse the holding of the First Circuit.

RESPECTFULLY SUBMITTED,

Judith Diaz-Santos
Pro Se
180 Hostos Ave.
Cond. El Monte Sur Apt. 723-B
San Juan PR 00918
787-367-6652

December 8, 2004

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

[DATE STAMP]

JUDITH DIAZ SANTOS,
Plaintiff,

v. Civil No. 99-1968 (JAF)

DEPARTMENT OF EDUCATION,
et al.,
Defendants.

[DATE STAMP]

JUDGMENT

On the basis of the terms of an Order subscribed by the Court today, and on the content of the docket documents referred to therein, judgment is entered dismissing the present case.

San Juan, Puerto Rico, this 26th day of September, 2003.

/s/ JOSE ANTONIO FUSTE
JOSE ANTONIO FUSTE
U.S. District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

[DATE STAMP]

JUDITH DIAZ SANTOS,
Plaintiff,

v. Civil No. 99-1968 (JAF)

DEPARTMENT OF EDUCATION,
et al.,
Defendants.

[DATE STAMP]

ORDER

The court has been patient to the extreme in dealing with this case. For months now, Plaintiff has been unable or unwilling to resolve this case by settlement and/or secure legal representation as previously ordered. The case is now dismissed for lack of diligent prosecution. *See Docket Document Nos. 56, 58, 61-73, 81, 83, 86-87, 89, and 91.*

Judgment to enter.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 26th day of September, 2003.

/s/ JOSE ANTONIO FUSTE
JOSE ANTONIO FUSTE
U.S. District Judge

United States Court of Appeals
For the First Circuit

No. 04-1234

JUDITH DIAZ-SANTOS,
Plaintiff, Appellant,

v.

DEPARTMENT OF EDUCATION OF THE COMMONWEALTH OF PUERTO RICO, ET AL.,
Defendants, Appellees.

JUDGMENT

Entered: August 13, 2004

This cause came on to be submitted on the briefs and original record on appeal from the United States District Court for the District of Puerto Rico.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of dismissal of the district court is affirmed.

By the Court: Richard Cushing Donovan, Clerk

MARK R. SYSKA
By: Mark R. Syska, Chief Deputy Clerk

[cc: Ms. Connick Waska and Mr. Montilla.]

Not for Publication in West's Federal Reporter
Citation Limited Pursuant to 1st Cir. Loc. R. 32.3

United States Court of Appeals
For the First Circuit

No. 04-1234

JUDITH DIAZ-SANTOS,
Plaintiff, Appellant,

v.

DEPARTMENT OF EDUCATION OF THE COMMONWEALTH OF PUERTO RICO, ET AL.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. Jose Antonio Fuste, *U.S. District Judge*]

Before

Boudin, *Chief Judge,*
Stahl, *Senior Circuit Judge,*
and Torruella, *Circuit Judge,*

Darlena H. Connick Waska and *Law Offices of Pedro E. Ortiz Alvarez* on brief for appellant.

Gary H. Montilla and *Quinones & Sanchez* on brief for appellees.

August 13, 2004

Per curiam. Plaintiff-appellant Judith Diaz-Santos appeals from the district court's dismissal of her employment discrimination claim for failure to prosecute. We affirm the dismissal.

I. BACKGROUND

Diaz-Santos, a teacher employed by the Department of Education of the Commonwealth of Puerto Rico (DOE), initiated a complaint with the Equal Employment Opportunity Commission during the 1991-1992 school year. The gist of her complaint was that she suffered from a mental disability that prevented her from working directly with children. The matter concluded with a negotiated settlement agreement providing certain accommodations under the Americans With Disabilities Act, (ADA)), 42 U.S.C. § 12101 *et seq*. Accordingly, Diaz-Santos was reassigned to the Superintendent's office.

On August 26, 1999, Diaz-Santos filed a complaint alleging employment discrimination in violation of the ADA and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. The complaint named as defendants the DOE and Victor Fajardo, the Secretary of the DOE, for allegedly reassigning her in violation of the settlement agreement, subjecting her to a hostile work environment, and refusing to promote her and/or consider her for positions for which she was qualified. Diaz-Santos amended her complaint in February, 2000.

On July 6, 2000, defendants moved to dismiss the amended complaint without prejudice. On October 31, the district court allowed the motion in part, dismissing Diaz-Santos's claims of discrimination under Title I of the ADA. The court, however, permitted the claim of retaliation under Title V of the ADA to proceed.

On April 4, 2002, defendants sought an interlocutory appeal of the district court's decision, which they voluntarily dismissed several months later. On December 27, 2002, after a number of pretrial conferences, trial was set for March 17, 2003. Thereafter, the district court stated in an order dated January 15, 2003, that "[t]his case seems to be a very good candidate for a sensible settlement disposition. Parties [are] ordered to explore alternatives and report to the court within 30 days. Case remains firmly set for trial in March."

In an order dated March 3, 2003, after setting forth the terms of a tentative settlement agreement, the court stated:

> [s]hould the case not be finally settled on or before March 21, 2003, then trial will go forward either during the last week of March or the first week of April... The parties shall be given twenty-four hours notice to begin trial, and shall be prepared to proceed on that notice or face dismissal for want of prosecution.

That trial date was reiterated as "firm and final" in subsequent orders. During the months of March and April of 2003, the district court continued to conduct settlement conferences.

On April 3, the court again stated in a procedural order that it was in tbe parties' interest to reach settlement. It noted,

> The defendant has been willing to consider reasonable terms for settlement. However, the plaintiff continues to have unrealistic expectations about what she may be

> entitled to under the law. Plaintiff's counsel will consult with his client again and review the possibility of, as well as the terms of, settlement. He shall notify the court... of the status of settlement by April 18, 2003.

On May 1, Diaz-Santos's counsel moved to withdraw representation on the ground that Diaz-Santos "can't, has not and will not, in any way help, aid, abet or assist counsel in a decisive, practicable and sound defense of her best interests." On June 22, 2003, the court allowed the motion and permitted Diaz-Santos until July 23, 2003, to obtain new counsel and have him or her make an appearance. It set that date as a "final term," and threatened that should Diaz-Santos not comply, "the case will be dismissed."

On July 23, a "Special Appearance to Request an Extension of Time to Retain Counsel" was filed on Diaz-Santos's behalf. It requested an additional forty-five days for new counsel to evaluate the case and obtain relevant records from Diaz-Santos's prior counsel. No further submissions were filed on behalf of Diaz-Santos, and the district court took no action until September 29, 2003 – sixty-six days after the initial deadline – when it dismissed Diaz-Santos's claims for lack of diligent prosecution. It stated in its order; "The court has been patient to the extreme in dealing with this case. For months now, Plaintiff has been unable or unwilling to resolve this case by settlement and/or secure legal representation as previously ordered." Judgment was entered that day.

On December 18, 2003, the court denied reconsideration of its order and judgment, and Diaz-Santos filed a timely appeal.

II. DISCUSSION

A district court's inherent powers to sanction parties for litigation abuses include the power to act *sua sponte* to dismiss a suit for failure to prosecute. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 n. 8 (1991); *Pomales v. Celulares Telefonica, Inc.*, 342 F.3d 44, 48 (1st Cir. 2003). We review such a dismissal pursuant to an abuse of discretion standard. *Bachier-Ortiz v. Colon-Mendoza*, 331 F.3d 193, 194 (1st Cir. 2003). "We do not lightly disturb a district court's ruling – but 'dismissal should not be viewed either as a sanction of first resort or as an automatic penalty for every failure to abide by a court order.'" *Id.* at 194-95 (quoting *Young v. Gordon*, 330 F.3d 76, 81 (1st Cir. 2003)).

Diaz-Santos claims three points of error: that the district court abused its discretion in dismissing the case for failure to prosecute; that it abused its discretion in denying her motion for reconsideration of that order; and that the court erred by allowing defendants' motion to dismiss her claim under Title I of the ADA. We review each argument in turn.

A. Dismissal for failure to prosecute

First, we address whether the district court erred in dismissing Diaz-Santos's complaint for failure to prosecute. In so doing, we consider the totality of the circumstances. *Bachier-Ortiz*, 331 F.3d at 195. Of particular importance are whether Diaz-Santos prosecuted her claims diligently until the time when she parted ways with her counsel; whether the district court provided Diaz-Santos fair warning of its inclination to employ such a severe sanction; and whether the delay she caused constituted misconduct "sufficiently extreme to justify dismissal with prejudice." *Pomales*, 342 F.3d at 49.

Diaz-Santos does not fare well under any of these factors. First, her conduct prior to her original counsel's withdrawal can hardly be characterized as diligent. The district court repeatedly indicated its frustration as to the parties' lack of preparedness, their delays as trial approached, and Diaz-Santos's failure to settle the case.[1] The court noted that Diaz-Santos "continue[d] to have unrealistic expectations" as to the strength of her case after several settlement conferences. This observation was confirmed by Diaz-Santos's former counsel in its motion to withdraw.

Second, the district court provided unambiguous notice of its intent to dismiss the case should Diaz-Santos not comply with its June 22, 2003 order permitting Diaz-Santos one month to obtain new counsel. Indeed, the court had warned that it would not hesitate to dismiss the case for failure to prosecute as early as March 3, when it set forth the terms of a tentative settlement agreement.

Third, we see no reason to second-guess the district court's determination that Diaz-Santos's delay constituted sufficient misconduct to warrant dismissal with prejudice. Initially, the court's June 22 order was not heeded, at least not fully: while new counsel did make an appearance, it was only conditional in nature, and sought additional time in which to determine whether it would take on the representation. Then, Diaz-Santos far exceeded counsel's requested extension without taking action before the district court finally dismissed her complaint. Under these conditions, we think the court demonstrated both ample patience and fairness.

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[1]We note that defendants appear to have some culpability as well in dilatory conduct occurring prior to the settlement conferences.

Diaz-Santos argues that her new counsel lacked documents that were necessary to assess the case and provide adequate representation. Even assuming that the new counsel was acting in good faith, there appears to be no viable excuse for allowing sixty-six additional days to pass in total silence after the filing of the notice of special appearance. Particularly in light of the district court's emphasis of the finality of the July 23 deadline, for obtaining new counsel, it remained Diaz-Santos's duty to inform the court of any obstacles and seek additional continuance if one was required.[2] Although the remedy of dismissal with prejudice was, perhaps, somewhat harsh, it did not exceed the district court's discretion.

B. Motion for reconsideration

We review a district court's denial of a motion for reconsideration under Fed. R. Civ. P. 59(e) for abuse of discretion. *Rivera v. P.R. Aqueduct & Sewers Auth.*, 331 F.3d 183, 192 (1st Cir. 2003). Here, Diaz-Santos contends that defendants were also culpable in the delays and reiterates her argument that she did not receive important documents until after the July 23 deadline had passed. Although there is some indication in the record that defendants, too, engaged in foot-dragging, it seems to be limited to the early part of the litigation. The district court's order was based, inter alia, on Diaz-Santos's failure to comply with a deadline for securing new counsel – conduct that has no relation to any action of the defendants – and it is on that basis that we affirm the district court's judgment.

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[2]We do not suggest that had Diaz-Santos moved for additional time, the district court would have been obliged to allow it.

C. Title I appeal

Lastly, we consider Diaz-Santos's argument that the court erred in dismissing her claim under Title I of the ADA based upon her failure to allege sufficient facts to establish a prima facie case of disability pursuant to 42 U.S.C. § 12101(2). We do not reach the merits of this issue, however, because it is beyond the scope of this appeal.

Normally, a notice of appeal that designates the final judgment encompasses not only that judgment, but also all earlier interlocutory orders that merge in the judgment. *John's Insulation, Inc. v. L. Addison & Assocs. Inc.*, 156 F.3d 101, 105 (1st Cir. 1998) (cases cited therein) In *John's Insulation*, however, we joined the majority of other circuit courts in recognizing an exception to that rule and holding that interlocutory rulings do not merge into a judgment of dismissal for failure to prosecute, and thus are unappealable. *Id.* at 107.

Because we affirm the district court's dismissal for failure to prosecute, we do not address the dismissal of the Title I claim further. "[I]f a complaint was correctly dismissed for failure to prosecute, the fact that earlier interlocutory rulings may have been erroneous is irrelevant." *Id.*

III. CONCLUSION

For the foregoing reasons, we *AFFIRM* the district court's dismissal.

United States Court of Appeals
For the First Circuit

No. 04-1234

JUDITH DIAZ-SANTOS,
Plaintiff - Appellant,

v.

DEPARTMENT OF EDUCATION OF THE COMMONWEALTH OF PUERTO RICO; VICTOR FAJARDO, in his individual and official capacity,
Defendants - Appellees.

Before

Boudin, *Chief Judge,*
Torruella and Selya, *Circuit Judges,*
Stahl, *Senior Circuit Judge,*
Lynch, Lipez and Howard *Circuit Judges,*

ORDER OF COURT

Entered: September 9, 2004

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeals be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc, be *denied.*

By the Court:
RICHARD CUSHING DONOVAN
RICHARD CUSHING DONOVAN, Clerk

[cc: Johanna M. Emmanuelli-Huertas, Esq., Pedro E. Ortiz-Alvarez, Esq., Gina Ismalia Gutierrez-Galang, Esq., Darlena H. Connick-Waska, Esq., Gloria Robison-Guarch, Esq., Sylvia M. Roger-Stefani, Esq. and Gary H. Montilla, Esq.]